U.S. Department of Labor

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Issue Date: 19 December 2003

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In the Matter of:

BERNARD G. YATES,
Claimant,

v. **Case No. 2002-BLA-05199**

U.S. STEEL MINING CO.
Employer, and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

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Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, ***et. seq***. (hereafter "the Act") filed by Claimant Bernard G. Yates ("Claimant") on January 22, 2001. The instant claim is the fourth claim filed by Claimant, who is unrepresented.

At Claimant's request, an "Order Canceling Hearing and Providing for Hearing on the Record" was issued on December 3, 2002, pursuant to which a scheduled hearing was cancelled and the parties were given an opportunity to object to a hearing on the record within 15 days. The Order also allowed the parties until January 6, 2003 to submit additional exhibits and until February 5, 2003 to submit any briefs or written arguments. Both Claimant and the Employer U.S. Steel Mining Company ("Employer") timely verified that they waived their right to an oral hearing, and the Employer submitted a letter brief dated February 4, 2003. The record transmitted by the District Director consists of Director's Exhibits 1 through 28 ("DX 1" through "DX 28".) There were no further evidentiary submissions and the record is now closed.

Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim, as it was filed after March 31, 1980, and the regulations amended as of December 20, 2000 are also applicable, as this claim was filed after January 19, 2001. 20 C.F.R. § 718.2. In ***National Mining Assn. v. Dept. of Labor***, 292 F.3d. 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected a challenge to, and upheld, the amended regulations with the exception of several sections which were found to be impermissibly retroactive and one which attempted to

effect an unauthorized cost shifting.[1] Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

The findings of fact and conclusions of law which follow are based upon my analysis of the entire record, including all evidence admitted and arguments made. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

Claimant filed the instant claim on January 22, 2001; he noted that he was born in December 1921; that he had worked in the coal mines for 32 years until his employer ceased operations in March 1982; and that he was unable to work due to shortness of breath, with occasional chest pains. (DX 5). He provided a history of working in the underground coal mines from November 1950 until March 1982, as an inside laborer. (DX 7). On February 22, 2001, the Employer controverted the claim. (DX 16). An examination was conducted for the Department of Labor by Dr. J. Randolph Forehand on February 27, 2001, following which Dr. Forehand determined that there was no evidence of coal worker's pneumoconiosis and no respiratory impairment. (DX 13). On October 18, 2001, the district director's office issued a Schedule for the Submission of Additional Evidence, which noted that based upon the evidence of record the Claimant would not be entitled to benefits and the Employer would be found to be the responsible operator. (DX 17). No additional evidence was submitted, and the district director issued a Proposed Decision and Order Denial of Benefits, finding that the Claimant was not entitled to benefits because the evidence did not show that he had pneumoconiosis, that the disease was caused at least in part by his coal mine work, or that he was totally disabled by the disease. [2] (DX 20). By letter of February 21, 2002, the Claimant requested a hearing, and the case was transmitted for a hearing on May 28, 2002. (DX 22, 25, 26).

Three prior claims were filed by the Claimant. (DX 1, 2, 3). The first, filed on May 21, 1980, was denied by Administrative Law Judge Frederick D. Neusner on May 4, 1987, following a May 6, 1986 hearing, and Judge Neusner's decision was affirmed by the Benefits Review Board ("Board") on May 31, 1989. Although Judge Neusner found that the Claimant had established pneumoconiosis, he found that the Claimant had failed to establish total disability. (DX 1). The second claim, filed on June 4, 1990 was denied by Administrative Law Judge George A. Fath in a decision of May 12, 1992, following a July 24, 1991 hearing, because the Claimant had not established total disability and therefore could not establish a material change in conditions. Judge Fath's decision was affirmed by the Board on September 28, 1992. (DX 2). The third claim, filed on February 22, 1994, was heard by Administrative Law Judge Jeffrey Tureck on July 16, 1996 and was denied by Judge Tureck's Decision and Order Denying Benefits of September 27, 1997, based upon the Claimant's failure to establish a change in conditions. Judge Tureck's decision was affirmed by the Board on October 16, 1997, and Claimant's request for reconsideration was denied by the Board on March 10, 1998. (DX 3).

[1] The only one of the impermissibly retroactive regulations pertinent to the instant case is 20 C.F.R. §718.204(a) (relating to total disability and providing that unrelated nonpulmonary or nonrespiratory conditions causing disability will not be considered in determining whether a miner is totally disabled due to pneumoconiosis); however, the amended rule is consistent with existing Fourth Circuit precedent.

[2] The district director also found the evidence to show that the Claimant was married.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

The issues listed on the CM-1025 transmittal form include existence of pneumoconiosis, its causal relationship with coal mine employment, total disability, and causation of total disability, as well as whether there has been a material change in conditions under section 725.309(d). (DX 25).

At an informal conference conducted on January 23, 1996, in connection with the Claimant's third claim, the parties agreed that the Claimant was employed as a miner after December 31, 1969, that he worked at least 32 years in or around one or more coal mines, that the Employer was the properly named responsible operator, that Claimant's wife Evelyn was a dependent within the meaning of the Act, that the Claimant had pneumoconiosis, and that the pneumoconiosis was caused by his coal mine employment. (DX 3). However, the existence of pneumoconiosis and its causal relationship to the Claimant's coal mine employment have been listed as issues, as those issues were decided against Claimant based upon the evidence developed in connection with this claim, and the district director has reduced the Claimant's period of coal mine employment to 31 years.[3] (DX 20, 25).

Discussion and Analysis

To prevail in a claim for Black Lung benefits, a claimant must establish that he or she suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he or she is totally disabled, as defined in section 718.204; and that the total disability is due to pneumoconiosis. 20 C.F.R. §§718.202 to 718.204. The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. In ***Director, OWCP v. Greenwich Collieries***, 512 U.S. 267 (1994), the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. Thus, in order to prevail in a black lung case, the claimant must establish each element by a preponderance of the evidence.

The instant claim is a duplicate or subsequent claim as there were three prior claims, each of which was finally denied. There is, accordingly, a threshold issue as to whether there are grounds for reopening the claim under 20 C.F.R. §725.309 (2003).

Prior to the recent amendment to the regulations, the general rule was to require that the administrative law judge make a threshold determination as to whether the evidence submitted since the final denial was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (1999) The standard for finding a "material change in conditions" was governed by the Fourth Circuit's holding in ***Lisa Lee Mines v. Director, OWCP,*** 86 F.3d 1358 (4th Cir. 1996) (***en banc***). In ***Lisa Lee Mines***, the Court adopted the Director's one-element standard, "which requires the claimant to prove, under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him." ***Id.***

[3] It is not clear that the district director has complied with amended section 725.309(d)(4), discussed infra.

The amended regulations have replaced the above standard with the following, essentially similar standard:

> (d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see §725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. **A subsequent claim** shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim **shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement** (see §§725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) **has changed since the date upon which the order denying the prior claim became final.**[4] The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
> (2) For purposes of this section, **the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based.** For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
> (3) **If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.** . .
> (4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, **any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim. . . .**[Emphasis added.]

20 C.F.R. § 725.309(d) (2003).

Extended discussion is unnecessary because, putting aside whether the existence of pneumoconiosis issue may be reconsidered, the claim must be denied because the Claimant still cannot establish total disability.

[4] For a miner, the conditions of entitlement include whether the individual (1) is a miner as defined in the section; (2) has met the requirements for entitlement to benefits by establishing pneumoconiosis, its causal relationship to coal mine employment, total disability, and contribution by the pneumoconiosis to the total disability; and (3) has filed a claim for benefits in accordance with this part. 20 C.F.R. §725.202(d) C*onditions of entitlement: miner.*

The regulations as amended provide that a claimant can establish total disability by showing pneumoconiosis prevented the miner "[f]rom performing his or her usual coal mine work," and "[f]rom engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." 20 C.F.R. §718.204(b)(1). Where, as here, there is no evidence of complicated pneumoconiosis, total disability may be established by pulmonary function tests, arterial blood gas tests, evidence of cor pulmonale with right sided congestive heart failure, or physicians' reasoned medical opinions, based on medically acceptable clinical and laboratory diagnostic techniques, to the effect that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in the miner's previous coal mine employment. 20 C.F.R. §718.204(b)(2). For a living miner's claim, it may not be established solely by the miner's testimony or statements. 20 C.F.R. §718.204(d)(5).

According to his recent submissions, Claimant was an inside laborer who was required to perform multiple jobs both inside and outside of the mines, to use mechanics tools, to frequently lift and carry up to 50 pounds, and to sit and stand for periods of between one and eight hours. (DX 7). At the previous hearings, he testified that his last coal mine employment was as a mechanic and that he also worked at various other jobs, including shuttle car operator and timberman. (DX 1, 3).

It is clear that the Claimant cannot establish total disability based upon the new evidence under any of the subparagraphs of section 718.204(b)(2):

Pulmonary function test. Under subparagraph (i), total disability is established if the FEV1 value is equal to or less than the values set forth in the pertinent tables in 20 C.F.R. Part 718, Appendix B, for the miner's age, sex and height, if, in addition, the tests reveal qualifying FVC or MVV values under the tables, or an FEV1/FVC ratio of less than 55%. The pulmonary function test taken on February 27, 2001(DX 13) produced the following values:

FEV1	FVC	MVV	FEV1/FVC
2.50	3.74	76	67%

Although Dr. Forehand commented that there was a mildly obstructive ventilatory pattern, these values do not qualify under the criteria set forth in 20 C.F.R. Part 718, Appendix B for Claimant's recorded height of 68 inches and the highest age listed (age 71), which require an FEV1 value of 1.73 or less for a male with a height of 68.1 inches. Although there is no value for Claimant's actual age of 79, the values decline with age so one can extrapolate that the value of 2.50 would also be nonqualifying for age 79. Although the failure to produce a qualifying FEV1 makes it unnecessary to consider the other values, it is worth noting that the other values are also nonqualifying. Accordingly, I find the new pulmonary function test weighs against a finding of total disability and therefore Claimant has not satisfied his burden of proof under section 718.204(b)(2)(i).

Arterial blood gases. The newly submitted arterial blood gases taken on February 27, 2001 (DX 13) (pCO2, 32 resting, 29 exercise and pO2, 75 resting, 79 exercise) are nonqualifying under the regulatory standards set forth in 20 C.F.R. Part 718, Appendix C, so Claimant has not satisfied section 718.204(b)(2)(ii).

Cor pulmonale with right-sided congestive heart failure. There is no evidence of cor pulmonale or congestive heart failure, so Claimant has not established total disability under section 718.204(b)(2)(iii).

Medical opinion. The newly submitted medical opinion evidence consists of the medical examination report of J. Randolph Forehand, M.D. Dr. Forehand conducted a thorough examination on February 27, 2001, noting an employment history, medical history, physical findings, and diagnostic testing results. In the Cardiopulmonary Diagnoses section of the form, Dr. Forehand stated "No evidence of coal workers' pneumoconiosis" and in the Impairment section he stated "no respiratory impairment." (DX 13). Thus, the medical opinion evidence does not establish total disability under section 718.204(b)(2)(iv).

Other evidence. The only other evidence consists of the x-ray reading by Dr. Forehand, a B-reader, finding no evidence of pneumoconiosis (although noting hyperinflation and a tortuous aorta); a treadmill stress test, that was terminated due to fatigue; and the electrocardiogram, which was abnormal but was interpreted by Dr. Forehand as showing "no acute changes." All of these tests were taken on February 27, 2001. (DX 13). They do not assist the Claimant in establishing total disability.

Section 718.204(b)(2) as a whole. Looking at section 718.204(b)(2) as a whole, I find that total disability has **not** been established by the newly submitted evidence. Quite simply, Claimant has not satisfied his burden of proof on the total disability issue. Moreover, consideration of the evidence previously of record in his three prior claims does not enable him to do so either. Accordingly, Claimant cannot establish total disability and therefore cannot establish a condition of entitlement.

Conclusion. As the Claimant cannot establish the condition of entitlement upon which the prior denial was based (total disability), his claim must be denied. Moreover, this claim fails on the merits because Claimant cannot establish total disability from a pulmonary or respiratory impairment. A separate discussion and analysis of the remaining issues raised in this claim is therefore unnecessary.

ORDER

IT IS HEREBY ORDERED that the claim of Bernard G. Yates for black lung benefits be, and hereby is, **DENIED**.

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.